Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	**)**	
	)	
Implementation of the Local Competition	**)**	**CC Docket No. 96-98**
Provisions in the Telecommunications Act	**)**	
of 1996	**)**	

COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

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SUMMARY

The Supreme Court, in *Iowa Utilities Board*, found that the Commission did not give substance to the "necessary and impair" standards of section 251(c)(3) of the Telecommunications Act of 1996. The Commission now seeks to refresh the record on the provision of unbundled network elements as it begins to revise Rule 319 to address the Supreme Court's decision.

In order to comply with the Supreme Court's decision, the Commission must now consider the availability of elements outside the incumbent's network. This requirement will cause the Commission to revise Rule 319 in a manner that significantly narrows the elements that incumbents must provide to requesting carriers at TELRIC prices.

CBT proposes that the Commission no longer prescribe a mandatory nationwide list of unbundled elements. To account for the fact that the presence of competitors and competition varies by geographic markets, these standards should be applied by the state commissions on a geographic, company-specific basis. However, based upon the ready availability of alternative sources of supply for switching, operator services and directory assistance, and advanced telecommunications services, the Commission should specify that these elements need not be unbundled by any ILEC.

Should the Commission continue to prescribe a list of unbundled elements, CBT proposes some alternate presumptions under which an ILEC would not be required to provide certain elements. CBT offers presumptions for local switching and operator services and directory assistance.

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COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

Cincinnati Bell Telephone Company ("CBT"), an independent, mid-size local exchange carrier submits these comments in response to the Commission's April 16, 1999 Second Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding.[1] This FNPRM seeks to refresh the record in CC Docket No. 96-98 in light of the Supreme Court's rejection of the Commission's implementation of the network element unbundling provisions of section 251(c)(3) of the Telecommunications Act of 1996 ("the 1996 Act"), and asks for comments on which specific network elements the Commission should require ILECs to unbundle.

I. INTRODUCTION

The Supreme Court, in *Iowa Utilities Board*,[2] found that the Commission did not give substance to the "necessary and impair" standards when it gave blanket access to network elements in Rule 319. In finding that the Commission failed to apply some limiting standard, the Court concluded that the Commission cannot "blind itself to the availability of elements outside

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking, (FCC 99-70), released April 16, 1999.
[2] *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

the incumbent's network."[3] This finding alone is sufficient to cause the Commission to revise Rule 319 in a manner that significantly narrows the elements that incumbents must provide to requesting carriers at TELRIC prices.

The Supreme Court also found that "the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms."[4] As a result of the Court's opinion on this issue, CBT submits that the Commission, when considering the application of this aspect of the Court's decision to its rules, must be cognizant of the goal of the 1996 Act, which is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[5] The Act's focus is on competition and consumers, *not* on individual competitors. Thus, the Commission must shift its focus from protecting competitors, to assessing the impact of its rules on competition and consumers. What may be in the best interests of a single competitor is most likely not be in the best interests of consumers. If the Commission's rules cause an inefficient deployment of resources due to distorted economic signals, consumers will ultimately suffer.

The remainder of CBT's comments focus on three primary issues: 1) the identification of a nationwide minimum set of unbundled elements; 2) the criteria for determining "necessary" and "impair" standards; and 3) the application of criteria to previously identified network elements and other network elements. As elaborated on more fully below, the Commission should not develop

[3] 119 S.Ct. at 735.
[4] *Id.*
[5] Preamble, Telecommunications Act of 1996, 110 Stat 56.

a nationwide list of unbundled elements since circumstances can vary by company and by geographic location. Instead, the Commission should specify that the state commissions should determine the elements to be unbundled for each ILEC based upon the availability of alternative sources of supply and the circumstances in that particular ILEC's territory. Furthermore, the Commission should specify that certain elements such as switching, operator and directory services, and elements used in the provision of advanced services should not be required to be unbundled by any ILEC.

II. THERE SHOULD NOT BE A NATIONWIDE SET OF UNBUNDLED ELEMENTS

The Commission tentatively concludes that is should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis. (FNPRM at ¶ 14). CBT proposes that the Commission no longer prescribe a nationwide list, but instead, establish standards that would be applied on a geographic, company-specific basis by the state commissions. This proposal would enable the state commissions to assess the availability of elements from alternative sources in the geographic area in which the new entrant is requesting the elements.

Clearly, a minimum list of unbundled elements for all companies is no longer appropriate. The presence of competitors and competition varies by geographic markets. As a result, alternatives to the ILEC's network elements will vary. In some areas, there may be several non-ILEC providers of certain elements which should eliminate the need to require the ILEC to provide the element, however, in another geographic area alternative sources of supply may not be readily available. To suggest that a list which was set for all incumbents in 1996 is still appropriate over three years later ignores the Commission's own observations that competition has not developed uniformly in all markets.

Rather than prescribe a nationwide list, the Commission should instead establish standards to be applied by the state commissions for the relevant markets in their states. Because it would be impossible for the Commission to have all of the necessary information about local and regional conditions to make an accurate assessment about every geographic market in the country, CBT recommends that the state commissions apply these standards. Furthermore, allowing state commissions to determine what elements a particular carrier must unbundle will enable them to factor in whether the ILEC has any significant advantage over the requesting carrier relative to economies of density, scale or scope or whether the requesting carrier may actually have the advantage, particularly in economics of scale and scope. This is especially important in the case of large national carriers (e.g., AT&T and MCI) requesting unbundled elements from mid-size and small ILECs.

As the Supreme Court and the Eight Circuit recognized, technical feasibility as used in §251(c)(3) of the Act does not mean that ILECs must unbundle every element that it is technically feasible to unbundle, but rather, refers to "where unbundled access must occur."[6] This distinction is particularly relevant to the smaller ILECs. When the Commission incorrectly determined that all elements that were technically feasible to unbundle must be unbundled, there was no room to consider the impact of such mandatory unbundling on the development of competition in markets served by mid-size and small carriers. Now that it is clear that technical feasibility applies only to the point at which unbundling must occur, it is appropriate for the state commissions to consider the impact of unbundling specific elements based upon the impact it will have on competition and consumers in the relevant market. It may be more appropriate for the new entrant to self-provision the elements rather than to make the ILEC provide the element, especially in the case of

[6] 119 S.Ct. at 736.

the smaller ILECs that lack the economies of scale and scope possessed by many of the large new entrants requesting unbundled elements. If the Commission sets standards for unbundling rather than a minimum list of elements, the state commissions can then assess the effect of competition in the market given the characteristics of the incumbent and the requesting carrier (or carriers).

III. AVAILABILITY OF NETWORK ELEMENTS OUTSIDE THE ILEC'S NETWORK IS THE PRIMARY CRITERION

CBT believes that regardless of the standards the Commission may ultimately set for determining if an element must be unbundled, the availability of the element outside the incumbent's network must be considered as an independent criterion. The Supreme Court has without a doubt directed the Commission to consider the availability of elements outside the incumbent's network. Justice Scalia's opinion for the Court indicates that the Commission's failure to consider self-provisioning or purchasing from another provider in and of itself was enough to set aside the current rules.[7] In addition, Justice Breyer, in his concurring statement, indicates that the Act "requires a convincing explanation of why facilities should be shared (or 'unbundled') where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available."[8] With the Court giving the availability of alternate sources of supply such prominence in its decision, the Commission cannot continue to ignore these alternatives. CBT believes that first test for unbundling should be to ascertain if an element is available from

[7] *Id.*

[8] Justice Breyer, concurring in part and dissenting in part. 119 S.Ct. at 753.

an alternate source. If the element can be reasonably self-provisioned by the CLEC or supplied by a non-ILEC supplier, the ILEC should not be required to provide the element. If an alternate source of supply is identified, no other determination need be made.

Only when no readily available source of supply is identified should state commissions consider the other standards established by the Commission. Although CBT does not in these comments recommend other specific standards, CBT stresses once again, the importance of standards that consider the impact on competition and consumers, rather than individual competitors.

IV. SWITCHING, OPERATOR SERVICES, DIRECTORY ASSISTANCE AND ADVANCED SERVICES ELEMENTS SHOULD NOT BE UNBUNDLED

While it is important for state commissions to determine on a geographic and ILEC specific basis if particular requested network elements must unbundled, CBT submits that there are certain elements that need never be considered for unbundling based on the strong evidence already available that ready alternatives to the incumbent's elements exist on a nationwide basis. The particular elements that the Commission should specify need not be unbundled for any ILEC are switching, operator services and directory assistance and any elements, excluding unbundled loops, used in the provision of advanced services.

A. Local Switching

Local switching is readily available from non-ILEC sources. Based upon the actions of competitive carriers since enactment of the 1996 Act, the evidence is irrefutable that new entrants do not need the ILECs' switching in order to provide local exchange service. Even with switching being available as an unbundled element at TELRIC prices, CLECs are opting to provide their own switching. For example, in Cincinnati, six facilities-based CLECs currently have switches operating and no carriers have requested unbundled switching. Furthermore, the

provision of the switching functionality is not geographically specific. A switch need not be physically located in the geographic market being served. It is possible for a CLEC to serve customers in geographically distant markets of multiple ILECs using a single switch. In fact, one CLEC operating in the Cincinnati area began providing service in Cincinnati by utilizing a switch located in another city over 200 miles away. By serving multiple markets via a single switch, CLECs can achieve economies of density comparable to those of the ILECs. In fact, for the smaller ILECs or for ILEC switches located in more remote areas, the CLECs may be better able to exploit economies of density than the ILECs who may be constrained due to regulatory restrictions on their ability to operate outside their defined territories.

B. Operator Services and Directory Assistance

Neither operator services nor directory assistance have a geographically distinct market. The market for these services is nationwide and there are many non-ILEC providers. Therefore, the Commission should determine that these services need not be unbundled by any ILEC. There has been a competitive market for operator and directory assistance services for many years with providers consisting of both telecommunications services companies and non-telecommunications services companies. Cincinnati Bell is aware of at least 17 competitive providers of operator services and 13 directory assistance providers. Many ILECs themselves (including CBT) have been purchasing these services from alternative providers for years and can attest to the fact that the market is competitive. Where an ILEC does not provide such services for itself but uses an outside contractor, it does not have the ability to unbundle that service without the cooperation of its vendor. In addition, the advent of the Internet has provided numerous new sources of directory assistance. There is simply no basis for mandating unbundling of operator or directory assistance by any ILEC.

C. Advanced Services

CBT submits that the Commission, when establishing its unbundling standards for application by the state commissions, should indicate that no ILEC should be required to unbundle any new elements used for the provision of advanced services. ILECs and CLECs stand on the same footing and are equally able to install equipment necessary to provision advanced services such as ADSL. Applying the unbundling requirements to only those elements that were deployed in incumbent networks for the provision of telephone exchange service at the time of enactment of the 1996 Act is sufficient to ensure that CLECs have the opportunity to develop and deploy their own new services without having to rely further upon the ILEC. There is simply no need to require unbundling of any other network elements. Competitors have the ability today to collocate in ILEC central offices, install DSLAMs, and transport the traffic to their own networks. ILECs have no increased ability or advantage inasmuch as ADSL and other emerging broadband technologies are available to all on a nondiscriminatory basis. In fact, the Commission, in its Report on the Deployment of Advanced Telecommunications Technologies concluded that "substantial investment in broadband technologies is taking place across virtually all segments of the telecommunications industry."[9] This same report documents the types of providers offering advanced services to consumers and the means by which they are doing so.[10] There is no evidence indicating that ILECs are able to provide these advanced services easier, faster or less costly than any other provider.

Imposing new obligations on ILECs to unbundle new equipment that CLECs can obtain for themselves will create economic disincentives for ILECs to invest in new equipment and

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[9] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Report, (FCC 99-5), released February 2, 1999, at para. 44.

services. As Justice Breyer observed in his concurring statement, "a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor."[11] If an ILEC's competitors are able to take advantage of the ILEC's initiative and innovation without the risk associated with introducing a new technology, and at prices that prohibit the ILEC from fully recovering its investment, there is no incentive for the ILEC to undertake these network improvements. Quoting Justice Breyer once again, no one can "guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."[12] Any requirements, such as unbundling new elements used for the provision of advanced services, that disincent investment in advanced telecommunications technologies are clearly at odds with the 1996 Act's goal of encouraging the rapid deployment of new telecommunications technologies.

V. ALTERNATE PRESUMPTIONS

If, in spite of the aforementioned arguments against prescribing a nationwide list of unbundled elements, the Commission continues to prescribe a minimum list of unbundled elements, it should also establish specific presumptions under which an ILEC would not be required to provide certain elements. An ILEC that satisfies these presumptions could then petition its state commission to certify that it has met these presumptions, and therefore, need not unbundle the particular elements in that state or in particular markets within the state.

CBT offers the following presumptions for several of the elements which the Commission originally required ILECs to provide on an unbundled basis:

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[10] *Id.* at paras. 53-61.
[11] *Id.*

***Local Switching*:** If three or more CLECs have switches located in an MSA (or other relevant geographic market) served by an ILEC, the ILEC need not provide local switching on an unbundled basis.[13]

***Operator Services/Directory Services*:** If the ILEC does not self-provision the service, the ILEC need not provide the service as an unbundled element. Many ILECs, particularly the smaller ones, contract with other providers for the provision of these services. Certainly if the ILEC itself can purchase these services from another provider, any CLEC can just as easily purchase the service from another provider and they would have no basis on which to argue that they would be impaired if they could not purchase the service from the ILEC. CBT, for example, purchases operator services from a large national non-ILEC provider. To require CBT to then provide this service to CLECs cannot be justified since these CLECs can purchase the service directly from a non-ILEC provider of operator services.

VI. CONCLUSION

In light of the Supreme Court's decision in *Iowa Utilities Board* the Commission must revise its rules to give substance to the "necessary" and "impair" standards in section 251(c)(3) of the 1996 Act. In order to do so in a meaningful way, the Commission must, first and foremost consider the availability of elements outside the ILEC's network. CBT submits that based solely on this criterion, the Commission should find that certain elements, in particular, local switching, operator services and directory assistance, and all advanced telecommunications services should not be subject to mandatory unbundling for any carrier. The decision whether to unbundle other network elements should be made by state commissions based upon standards established

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[12] *Id.*

[13] An MSA would be the smallest area for which this presumption would apply. The state commission

pursuant to this proceeding and applied on a geographic, company-specific basis.

Respectfully submitted.

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may approve the presumption for a larger market area.